No. 82-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

I. A. M. NATIONAL PENSION FUND,
Petitioner,

v.

MADGE H. ELSER AND MARGARET E. THOMAS,
individually and on behalf of all others similarly situated,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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Health and Retirement Funds

QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision, that the terms of an employee pension plan are subject to judicial review for "reasonableness" under Section 404(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), is in conflict with the Supreme Court's decision in *United Mine Workers of America Health & Retirement Funds v. Robinson.*

2. Whether the Ninth Circuit's decision, that the terms of an employee pension plan are subject to judicial review for "reasonableness" under Section 404(a)(1) of ERISA, misconstrues Section 404(a)(1) of ERISA.

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INTEREST OF THE AMICUS CURIAE

Amicus curiae is the Board of Trustees of the United Mine Workers of America ("UMWA") Health and Retirement Funds ("Funds"). The Funds is a collective reference to four irrevocable trust funds established by the UMWA and the Bituminous Coal Operators' Association, Inc., in the National Bituminous Coal Wage Agreement of 1974, and carried forward by the National Bituminous Coal Wage Agreements of 1978 and 1981, pursuant to and within the scope of Section 302(c)(5) of the Labor-Management Relations Act, 1947 (the "Taft-Hartley Act"), 29 U.S.C. §186(c)(5) (1976 & Supp. V 1981). The Funds consists of two pension plans, the UMWA 1950 and 1974 Pension Plans, and two welfare plans, the UMWA 1950 and 1974 Benefit Plans. The four plans are

employee benefit plans within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1002(3).

Last Term, the Trustees of the 1950 Benefit Plan petitioned for certiorari to review a decision of the District of Columbia Circuit that eligibility rules of employee benefit plans must meet a standard of "reasonableness," purportedly derived from Section 302(c)(5) of the Taft-Hartley Act. *Robinson v. United Mine Workers of America Health and Retirement Funds*, 640 F.2d 416 (D.C. Cir. 1981). The Supreme Court unanimously reversed the District of Columbia Circuit in *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), and held that eligibility rules are not subject to judicial review under "an undefined standard of reasonableness," because no such standard is imposed by the Taft-Hartley Act or by any other federal statute. 455 U.S. at 570, 574. Such rules must only meet the "detailed and comprehensive" requirements of ERISA. 455 U.S. at 576.

The Ninth Circuit, however, has concluded that Section 404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1), does require eligibility rules to withstand judicial review under a standard of "reasonableness," even if the rule in question is consistent with the detailed requirements of ERISA. *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982). If the Ninth Circuit's decision is allowed to stand, federal courts would be authorized to review and rewrite pension eligibility rules to accord with their own subjective standards of reasonableness. Indeed, they might do so, as the Ninth Circuit has done, even if the rules are specifically authorized by the detailed requirements of ERISA. Thus, federal courts would be free to substitute their judgment of proper pension policy for that of plan sponsors and Congress.

STATUTES INVOLVED

Section 302 of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. §186 (1976 & Supp. V 1981), provides in relevant part

(a) It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

* * *

(c) The provisions of this section shall not be applicable . . .

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of

> the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities . . . .

* * *

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, . . . to restrain violations of this section . . . .

Section 404(a) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1104(a) (1976 & Supp. V 1981), provides in relevant part

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

Section 401(a) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §401(a) (1976 & Supp. V 1981) provides in relevant part

> A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
>
> * * *
>
> (2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries . . . .

STATEMENT OF THE CASE

Petitioner, the IAM National Pension Fund (the "Fund"), is a joint-board employee benefit fund within the scope of Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. §186(c)(5), and an employee pension benefit plan as meant by Section 3(2) of ERISA, 29 U.S.C. §1002(2) (App. 12).*

* "(App. ___)" refers to the Appendix to the Petition for Writ of Certiorari filed by the IAM National Pension Fund.

The rules of the Fund, adopted by its trustees and known as Benefit Plan A (the "Plan"), provide, consistent with Section 203(b)(2)(A) of ERISA, 29 U.S.C. §1053(b)(2)(A), that an employee must have ten years of "credited service" to vest in a pension. Although an employee vests in a pension after ten years of credited service, payments do not begin until he attains fifty years of age (App. 15).

Credited service may consist of both "past" and "future" service. "Future" service is defined as service with an employer that is obligated to contribute to the Fund under an applicable collective bargaining agreement. "Past" service is defined as service with such an employer before its obligation to contribute arose (App. 14-15).

"Future" service is credited under all circumstances. However, Article IX, Section 4 of the Plan provides for cancellation of all past service credit acquired by employees of employers who cease to have an obligation to contribute to the Fund but remain in business (App. 15). Excepted from the cancellation of past service credit are those employees who were already receiving pensions or who had left their employment more than 24 months before, or within 30 days after, the date on which their employer ceased to have an obligation to contribute to the Fund. The Plan also allows the reinstatement of past service credit for employees who earn at least five more years of future service credit within eight years of the date on which their employer ceased to have an obligation to contribute to the Fund. (App. 15-16.)

Waste King Corporation ("Waste King") began contributing to the Fund on January 1, 1969, pursuant to a collective bargaining agreement with the International Association of Machinists and Aerospace Workers, AFL-CIO (the "Union"). On January 31, 1975, Waste King's collective bargaining agreement expired, and one month later its employees voted to decertify the Union. (App. 13.) Thereafter, Waste King no longer had an obligation to contribute to the Fund although the Company continued in business (App. 16).

Respondents Madge Elser ("Elser") and Margaret Thomas ("Thomas") both were employed by Waste King for at least ten consecutive years at the time the Company ceased to have an obligation to contribute to the Fund on January 31, 1975 (App. 12). Elser and Thomas had only six years of future service credit at that time. The remaining four years were past service credit. (App. 30.)

Thomas terminated her employment with Waste King in August, 1975, and applied for a pension shortly thereafter. As a result of the cancellation of her past service credit, she did not have ten years of credited service, and her application was denied. Elser terminated her employment in October, 1977, and subsequently was denied a pension for the same reason. (App. 13-14.)

On June 30, 1978, Elser and Thomas brought an action against the Fund in the United States District Court for the Central District of California, on behalf of themselves and a class of similarly situated persons. They alleged that the cancellation of "past" service was unreasonable in violation of Section 302(c)(5) of the Taft-Hartley Act and Section 404(a)(1) of ERISA.

Upon submission on a stipulated record, the District Court entered judgment in favor of the class. In a memorandum opinion, the District Court found that the cancellation provision was unreasonable and therefore in violation of Section 302(c)(5) of the Taft-Hartley Act and Section 404(a)(1) of ERISA. The Court concluded that the provision violated Section 302(c)(5) of the Taft-Hartley Act because it did not operate for the "sole and exclusive benefit of the employees." 29 U.S.C. §186(c)(5). And the Court concluded that the provision violated Section 404(a)(1) of ERISA because it did not operate "solely in the interest of the participants." 29 U.S.C. §1104(a)(1). In this regard, the District Court noted that ERISA expressly "permits a . . . plan to provide for the cancellation of past service credit upon an employer's cessation of contributions." Nevertheless, the Court concluded that a plan provision which accomplishes that result must

still "meet the standard under ERISA" of "reasonable[ness] under the circumstances." (App. 8.)

The Fund appealed to the United States Court of Appeals for the Ninth Circuit and the Ninth Circuit affirmed. In an opinion filed on August 20, 1982, the Ninth Circuit acknowledged that the Supreme Court recently decided that the "sole and exclusive benefit" provision of Section 302(c)(5) of the Taft-Hartley Act "hardly embodies [a] reasonableness requirement. Its plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others." *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 570.

The Ninth Circuit noted, however, that the disputed plan provision in *Robinson* was the product of collective bargaining. The cancellation provision in this case, on the other hand, was adopted by trustees. For this reason, the Ninth Circuit speculated that the decision in *Robinson* might not be dispositive, and that a provision adopted by trustees might still be reviewed for reasonableness under the "sole and exclusive benefit" provision in Section 302(c)(5) of the Taft-Hartley Act. In the view of the Ninth Circuit, however, it was unnecessary to consider whether Section 302(c)(5) has any continued vitality in this respect, because Section 404(a)(1) of ERISA, which requires trustees to act "solely in the interest" of participants, embodies a reasonableness requirement. And, because the Fund had failed "to meet its burden of showing a reasonable relationship between the cancellation provisions and the purpose of the fund," the Ninth Circuit concluded that those provisions were unreasonable and, therefore, in violation of Section 404(a)(1) of ERISA. (App. 28-46.)

The Fund petitioned the Ninth Circuit for a rehearing and a rehearing *en banc*. The Ninth Circuit denied the petition for rehearing and rejected the suggestion for a rehearing *en*

banc on November 10, 1982. The Fund's petition for a writ of certiorari followed. Amicus curiae supports the Fund's petition.

SUMMARY OF ARGUMENT

The Ninth Circuit decided that the requirement in Section 404(a)(1) of ERISA that employee benefit plans be administered "solely in the interest of . . . participants" and for the "exclusive purpose" of providing benefits to those participants imposes a standard of reasonableness pursuant to which federal courts may review and revise plan eligibility provisions. The decision of the Ninth Circuit directly conflicts with the decision of this Court in *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982). In *Robinson*, this Court stated, in addressing the "sole and exclusive benefit" rule of Section 302(c)(5) of the Taft-Hartley Act, that "[t]here is no general requirement that the complex schedule of . . . employee benefits must withstand judicial review under an undefined standard of reasonableness." 455 U.S. at 574.

Moreover, the decision of the Ninth Circuit misconstrues Section 404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1). Section 404(a)(1) of ERISA requires a pension plan trustee to administer the plan and its assets for the exclusive benefit of plan participants and beneficiaries. The "exclusive benefit" rule in Section 404(a)(1) does not authorize judicial review of plan provisions allocating assets among eligible beneficiaries. Rather, the rule simply reflects a longstanding requirement, originating in federal tax law, that pension plan assets must not accrue to the benefit of employers or any party other than plan participants. Absent a violation of this requirement, however, pension plan provisions are not subject to challenge under Section 404(a)(1) of ERISA. Of course, pension plans are subject to review for a violation of the minimum standards set forth in ERISA.

ERISA sets forth detailed and comprehensive standards that a pension plan must satisfy. These standards govern

vesting, participation, and funding; reporting and disclosure; and fiduciary conduct. 29 U.S.C. §§1021-1132. A pension plan that conforms with these standards in ERISA, and other federal law, is not subject to review and revision by federal courts.

The IAM Fund contains a vesting standard that is explicitly authorized by Section 3(37) of ERISA, 29 U.S.C. §1002(37). The Ninth Circuit ignored Section 3(37) of ERISA, disregarded prior decisions of this Court, and erroneously concluded that Section 404(a)(1) of ERISA allowed the review and revision of the vesting standard because it was unreasonable. Therefore, the IAM Fund's petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit, that the terms of an employee pension plan are subject to judicial review for "reasonableness" under Section 404(a)(1) of ERISA, is in conflict with the Supreme Court's decision in United Mine Workers of America Health & Retirement Funds v. Robinson, and misconstrues Section 404(a)(1) of ERISA.

Section 302 of the Taft-Hartley Act makes it unlawful for an employer to make payments to a labor organization that represents its employees, except where, *inter alia*, the payments are made to a trust fund that satisfies the requirements in Section 302(c)(5). 29 U.S.C. §186(a),(c)(5). Section 302(c)(5) requires, among other things, that the trust fund be used "for the sole and exclusive benefit of the employees" of contributing employers. 29 U.S.C. §186(c)(5).[1] Where the fund is used otherwise, federal courts have decided that they have jurisdiction under Section 302(e) to restrain

[1] Among the other requirements, employer payments must be held in trust and used only to pay certain types of benefits; the basis of such payments must be set forth in a written agreement with the employer; and the employees and the employers must be equally represented in the administration of the trust. 29 U.S.C. §186(c)(5)(A),(B).

such use as a violation of Section 302.[2] *See In re Typo-Publishers Outside Tape Fund*, 478 F.2d 374 (2d Cir.), *cert. denied sub nom. Christensen v. New York Times Company*, 414 U.S. 1002 (1973); *Blassie v. Kroger Company*, 345 F.2d 58 (8th Cir. 1965). *Compare Haley v. Palatnik*, 509 F.2d 1038 (2d Cir. 1975) *with Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968).

Other federal courts have decided, however, that they have jurisdiction to review the allocation of funds among eligible beneficiaries, *i.e.*, employees of contributing employers, by virtue of Section 302(c)(5) of the Taft-Hartley Act. These courts have held that unreasonable eligibility provisions constitute a violation of the "sole and exclusive benefit" provision in Section 302(c)(5), and may be restrained under Section 302(e). *See, e.g., Ponce v. Construction Laborers Trust*, 628 F.2d 537 (9th Cir. 1980); *Knauss v. Gorman*, 583 F.2d 82 (3d Cir. 1978).

Last term, however, the Supreme Court held in *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, that the "sole and exclusive benefit" provision "hardly embodies [a] reasonableness requirement" that would authorize judicial review and modification of pension eligibility rules. 455 U.S. at 570. Rather, "[i]ts plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees, . . . to the exclusion of all others." *Id.* In reaching this conclusion, the Court relied on the legislative history of Section 302, and the specific conditions set forth in Section 302(c)(5)(A) and (B). 455 U.S. at 571-72. According to the Court, "[e]ach of the specific conditions . . . is consistent with the nondiversion purpose" of the statute, and together they "fortify the basic requirement that employer contributions be administered for the sole and exclusive benefit of employees." 455 U.S. at 572. The Court concluded, therefore, that

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[2] Subsection (e) of Section 302 provides that federal courts have authority "to restrain violations" of Section 302. 29 U.S.C. §186(e).

"[n]one of the conditions places any restriction on the allocation of the funds among the persons protected by §302(c)(5)." *Id.*

Nor does any other federal statute impose a "reasonableness" requirement, according to the Supreme Court. *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 574. Indeed, the Court stated that "[t]here is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness." *Id.* Therefore, assuming an employee benefit plan does not violate the "detailed and comprehensive standards of . . . ERISA" or some other Act of Congress, such as the Civil Rights Act of 1964, federal courts have no general authority to review eligibility rules in the plan. 455 U.S. at 575 and n. 15.

In this case, however, the Ninth Circuit noted that the disputed plan provision in *Robinson* was the product of collective bargaining. The plan provision in this case, on the other hand, was adopted by trustees. Therefore, the Ninth Circuit speculated that the decision in *Robinson* might not be dispositive, and that a provision adopted by trustees may still be reviewed for reasonableness under the "sole and exclusive benefit" provision in Section 302(c)(5) of the Taft-Hartley Act.

Earlier this Term, however, the Supreme Court made it clear that the manner in which a plan provision is adopted is without significance. In *Music v. Western Conference of Teamsters*, 660 F.2d 400 (9th Cir. 1981), the Ninth Circuit declared that a pension plan provision adopted by trustees was "unreasonable" and, therefore, in violation of Section 302(c)(5) of the Taft-Hartley Act. 660 F.2d at 402 nn. 2-3. The trustees petitioned for certiorari and the Supreme Court granted the writ, summarily vacated the judgment of the Ninth Circuit, and remanded the case for further consideration in light of the principles announced in *Robinson*. *See Western Conference of Teamsters Pension Trust Fund v. Music*, 459 U.S. ____, 103 S.Ct. ____, 74 L.Ed.2d 48 (1982).

In this case, however, the Ninth Circuit decided that it was unnecessary to consider whether Section 302(c)(5) continues to have any vitality, because there is authority to review eligibility provisions for reasonableness under the "solely in the interest" clause in Section 404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1). In so deciding, the Ninth Circuit demonstrates that it is unwilling to follow the Supreme Court's decision in *Robinson*. Although the Supreme Court made it clear that "[t]here is no general requirement . . . of reasonableness," *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 574, the Ninth Circuit strains to find such a requirement in Section 404(a)(1) of ERISA. Indeed, the Ninth Circuit concludes that Section 404(a)(1) of ERISA authorizes precisely what the Supreme Court said federal courts may not do—review and revise plan provisions under a subjective and "undefined standard of reasonableness." *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 574. In doing so, the Ninth Circuit misconstrues Section 404(a)(1) of ERISA.

Section 404(a)(1) of ERISA requires the trustees of an employee benefit plan to administer their trust "solely in the interest of the participants" and "for the exclusive purpose of . . . providing benefits" to them. 29 U.S.C. §1104(a)(1)(A). The Ninth Circuit concludes that this language in Section 404(a)(1) of ERISA empowers federal courts to review and revise pension plan provisions that are unreasonable. The Ninth Circuit fails to note, however, that this language in Section 404(a)(1) of ERISA is virtually duplicated in Section 401(a)(2) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §401(a)(2). And, Section 401(a)(2) of the Code has never been interpreted to require pension plan provisions to meet a standard of reasonableness.

Section 401(a)(2) of the Internal Revenue Code and its counterpart, Section 404(a)(1) of ERISA, simply incorporate a longstanding requirement of federal tax law—that an employee pension trust will be afforded tax-exempt status only if trust assets accrue to the "exclusive benefit" of the

employees and their beneficiaries.[3] *Pension Benefit Guaranty Corporation v. Ouimet Corp.*, 630 F.2d 4, 9 (1st Cir. 1980), *cert. denied*, 450 U.S. 940 (1981). This requirement initially was imposed upon pension trusts in 1926.[4] The requirement was also contained in each of the revisions or codifications of federal tax law that preceded the enactment of the Internal Revenue Code of 1954. *See, e.g.*, Revenue Act of 1928, §165; Revenue Act of 1936, §165; Internal Revenue Code of 1939, §165(a). And, the requirement was incorporated into Section 401(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C. §401(a)(2)(1954). Under the implementing Treasury Regulations, a pension plan satisfied the "exclusive benefit" requirement of Section 401(a)(2) of the Code if it prevented the employer that established the plan from diverting trust assets to its own use. *See* Treas. Reg. §1.401-2(a)(2)(1964).

The requirement that trust assets be used for the "exclusive benefit" of employees and their beneficiaries was "strictly construed" to deny tax exemption to pension plans that permitted an employer, or its stockholders, to obtain

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[3] The provisions of Title I of ERISA, which includes Section 404(a)(1), are virtually duplicated in federal tax law, as codified in the Internal Revenue Code of 1954, as amended. The Title I requirements of minimum participation, vesting and funding are codified at 29 U.S.C. §§1001-1144; the coordinate tax provisions are set forth in 26 U.S.C. §§401-415. *See Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 and n. 1 (1980).

[4] Section 219(f) of the Revenue Act of 1926 provided, in pertinent part:

> A trust created by an employer as a part of a stock bonus, pension, or profit-sharing plan for the exclusive benefit of some or all of his employees, to which contributions are made by such employer, or employees, or both, for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, shall not be taxable . . . .

The language of Section 219(f) was derived from Section 219(f) of the Revenue Act of 1921, which imposed identical requirements upon profit-sharing and stock bonus plans. *See Olstad v. Commissioner*, 32 B.T.A. 670 (1935).

trust assets. *Community Services, Inc. v. United States*, 422 F.2d 1353, 1358 (Ct. Cl. 1970); *Parker v. Commissioner*, 38 B.T.A. 989, 995 (1938). So long as no diversion of trust assets to an employer occurred, however, the pension plan satisfied the "exclusive benefit" rule. *Tavannes Watch Co. v. Commissioner*, 176 F.2d 211, 216 (2d Cir. 1949); *United States v. Kintner*, 216 F.2d 418, 426-28 (9th Cir. 1954).

In short, just as Section 302(c)(5) of the Taft-Hartley Act was designed to prohibit union diversion of pension funds, Section 404(a)(1) of ERISA and its counterpart, Section 401(a)(2) of the Internal Revenue Code, were designed to prohibit employer diversion of such funds. Consequently, so long as a pension trust does not permit payment of benefits to, or use of trust assets by, persons other than employees, the plan is not subject to challenge under Section 404(a)(1) of ERISA. *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 574.

To be sure, employee benefit plans are subject to review for compliance with ERISA. The requirements of ERISA are "detailed and comprehensive," *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 575, and set forth explicit standards governing participation, vesting and funding, reporting and disclosure, and standards of fiduciary conduct. 29 U.S.C. §§1021-1132. Section 404(a)(1)(D) of ERISA specifies that trustees may not enforce a pension plan provision that contravenes these requirements. 29 U.S.C. §1104(a)(1)(D). And, Congress provided in Section 502 of ERISA that any violation of these standards is subject to challenge in federal courts by a plan participant, beneficiary, or fiduciary, or by the Secretary of Labor. 29 U.S.C. §1132. In the absence of such a violation, however, nothing in ERISA allows a federal court to review and revise a provision of a pension plan because the court finds the provision to be unreasonable. 29 U.S.C. §1132(a)(1)-(5).

The cancellation provision invalidated here by the Ninth Circuit violates none of the standards set forth in ERISA.

To the contrary, Section 203(b)(1) of ERISA expressly provides that pension plans are not required to provide any credit for "years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan . . . ." 29 U.S.C. §1053(b)(1)(C). Moreover, as the District Court and the Ninth Circuit acknowledge, Section 3(37) of ERISA "specifically permit[s] a multiemployer plan to provide for cancellation of past service credit . . ." (App. 21, 41).[5]

The Supreme Court has stated that ERISA is a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361.[6] And, the Supreme Court has emphasized that federal courts are not free to disregard the provisions of ERISA, and "to second guess the policy decisions of the legislature." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521 (1981). The Ninth Circuit ignored this principle. It chose to disregard the explicit provisions of ERISA in favor of its own conceptions of appropriate pension policy. This was clearly improper. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980).

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[5] The relevant provision in Section 3(37) was recodified as Section 203(a)(3)(E)(i) of ERISA, 29 U.S.C. §1053(a)(3)(E)(i)(Supp. V 1981), by Section 303 of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, 1292 (1980).

[6] As Congress noted, ERISA contains the "minimum standards . . . assuring the equitable character of [pension] plans and their financial soundness." 29 U.S.C. §1001(a).

CONCLUSION

Upon the foregoing, it is respectfully submitted that a writ of certiorari should be issued to review the decision of the Ninth Circuit in this case.

Respectfully submitted,

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